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IN THE UNITED STATES BANKRUPTCY COURT FOR  
THE SOUTHERN DISTRICT OF NEW YORK

In re:

Chapter 11

CEDAR CHEMICAL CORPORATION

and VICKSBURG CHEMICAL COMPANY

Case Nos: 02-11039 (SMB) and

02-11040 (SMB)

Debtors

OBJECTION OF THE MISSISSIPPI COMMISSION ON ENVIRONMENTAL  
QUALITY AND THE MISSISSIPPI DEPARTMENT OF ENVIRONMENTAL QUALITY  
TO DEBTORS' MOTION TO ABANDON ITS VICKSBURG,  
WARREN COUNTY, MISSISSIPPI FACILITY

STATE OF MISSISSIPPI )

)

COUNTY OF HINDS )

Chuck D. Barlow, being duly sworn, deposes and states:

1. I am General Counsel of the Mississippi Commission on Environmental

Quality (the Commission) and the Mississippi Department of Environmental Quality (MDEQ), and an attorney duly admitted to the Bar of the State of Mississippi and to the federal Court for the Northern and Southern Districts of Mississippi, the United States Court of Appeals for the Fifth Circuit, and the United States Supreme Court. I submit, by affidavit, this Objection of the Commission and MDEQ to Debtors' Motion to Abandon its Vicksburg Chemical Company facility in Warren County, Mississippi (VCC), on the grounds that this Court lacks jurisdiction to grant the relief requested in Debtors' motion, or, in the alternative, upon accepting jurisdiction, to deny Debtors' motion. The factual portion of this submission is based upon my review of the background to the VCC facility in Mississippi, including MDEQ files, and discussions with MDEQ personnel. The factual grounds of this submission will be further supported by testimony and documents to be adduced and submitted by MDEQ personnel at a plenary hearing that we will respectfully seek at the September 25, 2002 hearing on Debtors' motion and status conference, to set for the near future.

#### **I. Introduction.**

Debtors' Motion to Abandon its Vicksburg, Mississippi Facility (VCC) is an attempt to escape Debtors' duty to comply with environmental permits, orders, laws, and regulations designed to protect human health and the environment. VCC is grossly contaminated with significant levels of at least fourteen known carcinogens and a number of other contaminants. VCC is located in close proximity to residential and recreational areas and in a predominantly minority city. VCC requires constant operation, maintenance and electrical service in order to prevent specific identified environmental catastrophes. VCC has failed to comply with its

environmental permits and orders, laws, and regulations applicable to proper closure of its site.<sup>1</sup> Debtors' bad faith is even more evident when one considers that Debtors have had no discussions with the Mississippi Commission on Environmental Quality (Commission) and/or the Mississippi Department of Environmental Quality (MDEQ) regarding abandonment of VCC, with the exception that they forwarded a copy of their motion to MDEQ counsel after being hounded to do so.

The Commission and MDEQ respectfully request that this Court determine that it lacks jurisdiction to grant the relief requested in Debtors' motion, or, in the alternative, that the Court deny Debtors' motion.

**II. The Commission And MDEQ, Acting On Behalf Of The State Of Mississippi, Are Interested Parties.**

The Commission, a seven-member body appointed by the Governor of Mississippi, is authorized to develop, implement, and enforce environmental policy in Mississippi. Among other duties, the Commission adopts air and water pollution control regulations, including air and water pollution control permit requirements, and conducts enforcement of permit and regulatory violations. The regulations adopted by the Commission set the requirements that must be met by applicants in order to obtain a permit from the Mississippi Environmental Quality Permit Board (Permit Board). By adopting regulations and carrying out enforcement actions in the areas of water pollution control, air pollution control, solid (nonhazardous) waste, and hazardous waste, the Commission administers programs under several federal environmental laws through

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<sup>1</sup>VCC's NPDES (Clean Water Act) permit, Part III.B, requires VCC to submit a Closure Plan to the Mississippi Environmental Quality Permit Board no later than 90 days prior to closing the VCC facility. VCC has not submitted a closure plan to date.

delegation agreements with the United States Environmental Protection Agency (USEPA). *See* Miss. Code Ann. §§ 49-2-1, *et seq.*; 49-17-1, *et seq.*

The authority of the Permit Board is much more limited and specific, but is crucial to this litigation. Miss. Code Ann. § 49-17-29 (Supp. 1997) describes the Permit Board as:

[T]he exclusive administrative body to make decisions on permit issuance, denial, modification or revocation of air pollution control and water pollution control permits and permits required under the Solid Wastes Disposal Law of 1974 (Title 17, Chapter 17).

Transfers of permits are, by definition, modifications. The Permit Board may require applicants to submit application information regarding facilities and projects "as it deems necessary" for making a decision on that permit. MDEQ serves as the technical, administrative, and legal staff for both the Commission and the Permit Board.

### **III. This Court Lacks Jurisdiction To Grant The Relief Requested Through The Debtor's Motion To Abandon.**

#### **A. Granting The Current Motion Would Violate The Eleventh Amendment Immunity of the State of Mississippi.**

The interrelation of the Bankruptcy Code and the Eleventh Amendment has become a major point of contention since the Supreme Court issued its decision in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), strengthening the Court's interpretation of the Eleventh Amendment's protection of States from the jurisdiction of federal courts. Since that time various actions of Bankruptcy Courts implicating the authority or property of a State have been reversed because of the Eleventh Amendment's jurisdictional bar. *See, e.g., In re NVR, LP*, 189 F.3d 442, 450-55 (4<sup>th</sup> Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000) (discussing cases). The current Motion To Abandon urges this Court to grant relief to the Debtor that would violate the Eleventh

Amendment in ways similar to those listed in *NVR*. By stating this objection, the Commission and MDEQ do not submit to the jurisdiction of this Court, but appear to argue in favor of the application of 11<sup>th</sup> Amendment immunity. Neither the Commission nor MDEQ is authorized to waive 11<sup>th</sup> Amendment immunity on behalf of the State of Mississippi.

The Vicksburg facility operates under two environmental permits issued by the Mississippi Environmental Quality Permit Board ("Permit Board"), the exclusive entity in Mississippi authorized to issue such permits. The Permit Board issued the facility's National Pollutant Discharge Elimination System Permit ("NPDES") under authority granted by USEPA through delegation agreements entered pursuant to the federal Clean Water Act and under the authority of Miss. Code Ann. §§ 49-17-28 and 49-17-29 (Rev. 1999). Similarly, the Permit Board has issued a Clean Air Act Title V Operating Permit to the facility pursuant to Mississippi statute authority and state-federal delegation agreements. Under those state statutes and state-federal delegation agreements, no other agency has the initial authority to issue the environmental permits necessary for this facility to operate its production facility or to continue to operate its remedial wastewater treatment system. Also, no other agency has the authority to transfer these permits from one permittee to another as ownership of the property changes. For the ownership of this property to transfer without the Permit Board's approval of the related transfer of environmental permits violates state law, because the new owner would be operating the facility without the permits required by the federal Clean Water Act and Clean Air Act and by Miss. Code Ann. § 49-17-29. Also, transfer of this property without Permit Board approval would violate the Title V permit, § 1.20, the NPDES Permit, Chapter One, § III.B., and the state regulations on which those requirements are based. See Mississippi Commission on

Environmental Quality Air Emissions Operating Permit Regulations For The Purposes Of Title V Of The Federal Clean Air Act (APC-S-6), § IV.D.4; Mississippi Commission on Environmental Quality Wastewater Regulations For National Pollutant Discharge Elimination System (NPDES) Permits, Underground Injection Control (UIC) Permits, State Permits, Water Quality Based Effluent Limitations And Water Quality Certification (WPC-1), Chapter One, § V.C.2(b).

The approval of a transfer to USEPA is problematic. USEPA has no statutory authority to own or lease the Vicksburg Chemical facility. The Permit Board is precluded by Mississippi regulation from issuing a Title V or NPDES permit to an entity that does not control the real property on which a facility is located. WPC-1, Chapter One, § I.C.1(f).<sup>2</sup> Therefore, this Court's grant of the Debtor's motion will directly usurp the authority of the Permit Board, and thus of the State of Mississippi, in two ways: (1) The State's environmental permitting and permit transfer regulations will be rendered meaningless, because the property and the ongoing wastewater disposal process will be transferred from one entity to another without the approval of the Permit Board and without affording the Permit Board the opportunity to condition the permits as it would see appropriate; and (2) The State would be forced to deny the permit transfers or to transfer the permits in violation of its own regulations, because USEPA has no authority to own or lease the real property at issue.

Additionally, it is unclear how the state-issued NPDES permit would maintain viability if the State was forced to transfer the permit to USEPA - the federal agency that delegates federal authority to the State to issue the permit in the first place. If violations of the permit then

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<sup>2</sup>That regulation requires that control be demonstrated through "ownership, lease, eminent domain, easement, license, and/or contract."

occurred, to whom would the Commission initiate an enforcement action against--USEPA Region 4? It is unlikely that the federal government would consent to be made a party to a state administrative enforcement proceeding or to state-court litigation.

Transfer of the Vicksburg property to USEPA also would place an eventual financial burden directly on the State of Mississippi. For USEPA fully to remediate this grossly contaminated facility, the facility must be placed on the National Priorities List ("NPL") created by the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* See 40 C.F.R. pt. 300 (the National Contingency Plan, addressing procedures for USEPA removals and remediation activities). It is unlikely that this site will rank highly enough on USEPA's Hazard Ranking System to qualify for NPL listing if it has not already done so during twelve years of facility assessment.

If the site does qualify for NPL listing, and USEPA spends response costs at the site necessary to completely remediate the site, the State will be required to reimburse the federal government at least ten percent of the response costs. 40 C.F.R. § 300.510(b)(1). If the site does not qualify for NPL listing, MDEQ's experience over the years indicates that USEPA will be very limited in the funds that it can spend at the site (a limitation to approximately \$2,000,000). After spending this amount to stabilize the site or to remediate the most immediately threatening problems, USEPA likely would inform the State that the State would have to conduct any further remediation activities. For example, for non-NPL sites that contain both surface soil contamination and groundwater contamination, USEPA usually will remediate the soil contamination (up to an expenditure of approximately \$2,000,000) and then will hand the site to the State for the much more costly groundwater remediation.

Any order of this Court placing these burdens on the State of Mississippi would violate the Eleventh Amendment. As discussed in *In re NVR, LP*, 189 F.3d 442, 450-55 (4<sup>th</sup> Cir. 1999), *cert. denied*, 528 U.S. 1117 (2000), a contested matter in bankruptcy becomes an Eleventh Amendment issue when “the federal courts exercise jurisdiction over the states.” 189 F.3d at 453. In the bankruptcy context, jurisdiction is exercised by the court not only when the State is hauled into court through a summons in an adversarial proceeding, but also when the remedy the Debtor is seeking in a contested matter would require the State to take certain action, or the court’s decision on the motion would be meaningless. *Id.* In *NVR*, the court’s action would have had no effect had the court not ordered the States of Maryland and Pennsylvania to reimburse certain tax payments to the debtor. Here, the court’s abandonment ruling would be meaningless because, unless the court seeks to order the Permit Board to transfer permits to USEPA, a step that would violate state regulations, the State will continue to require compliance with the NPDES and Title V permits from *Vicksburg Chemical*, the permittee and it is in no manner certain that the Permit Board, of its own volition, would approve a transfer of these permits to USEPA.

Also, as explained above, the Court’s grant of this motion would “demand[] affirmative action by [Mississippi],” and would create a burden on “an unconsenting state’s treasury,” two other indications that the Court’s action would violate the Eleventh Amendment. *Id.* Mississippi asserts that the conclusion to this issue should be that reached in *NVR*: “In sum, despite the fact that neither Maryland nor Pennsylvania suffered the indignity of being summonsed to appear in a federal court, we determine that they are immune from the prosecution of *NVR*’s Rule 9014 motion.” *Id.*



**B. Pursuant To The Local Action Rule, This Court Lacks Jurisdiction To Involuntarily Transfer Ownership Of Real Property Located In Mississippi.**

Federal courts do not have jurisdiction to determine “local actions”—cases that directly affect the ownership of real property (or even torts, such as trespass, arising directly from the existence of real property) located in another state. *Hayes v. Gulf Oil Corp.*, 821 F.2d 285, 287 (5<sup>th</sup> Cir. 1987) (citing *Ellenwood v. Marietta Chair Co.*, 158 U.S. 105, 107 (1895); *Livingston v. Jefferson*, 15 F. Cas. 660 (C.C.D. Va. 1811)). “The local action rule is so fundamental that state courts are not obligated to give full faith and credit to judgments from either federal or state courts sitting outside the local state’s territorial boundaries.” *Id.* An action is “local”, even when *in personam*, when the action at issue is so closely tied to the real property that it could only occur in that State. *Id.* at 287-88. The Fifth Circuit held in *Hayes* that an action to terminate a party’s interest in real estate is a local action, and that the local action rule stands as a limitation on federal question and diversity jurisdiction similar to the federal court’s refusal to hear probate and domestic relations cases. The Fifth Circuit stated:

Equally cogent reasons also underlie application of the local action doctrine. Contrary to Hayes assertions, the rule is not out-dated and archaic. The rationale for the rule is as forceful today as it was in Chief Justice Marshall’s time, and remains as, if not more, compelling than the domestic relations or probate exceptions. If litigants were free to file claims to the same Colorado real property in different federal and state courts throughout the country, the State of Colorado could not give conflicting judgments full faith and credit. More significantly, title to real estate would never be certain again since it could be involved in unknown claims in unknown fora with no practical method for control of liens, *lis pendens* or priority of title claims. State land title records would become unmanageable. The local action rule prevents courts unfamiliar with local property rights and laws from interfering with title to real property which must be recorded under a unitary set of rules to keep it free of conflicting encumbrances. These local rules ensure that real property actions will be tried in a convenient forum and that orderly notice to all interested parties—through Colorado land title records—will be facilitated.

*Id.* at 290.

Another issue that arises specifically from the management of contaminated land and which local state officials have particular knowledge concerning is the facility's potential to implicate environmental justice concerns. Both USEPA and MDEQ have raised the concern that this facility's location and condition implicates environmental justice considerations, and on a recent inspection MDEQ documented at least two minority or low-income neighborhoods located within one-half mile of the Vicksburg Chemical gates. These are highly sensitive issues which MDEQ, the Commission, and the Permit Board will have to consider in taking any action at this facility, including permit transfers and the approval of VCC's yet-to-be-submitted closure plan.

The local action rule is similar to the rule that a court can exercise jurisdiction over an item *in rem* only if the item is within the territorial jurisdiction of the court. To that end, the Southern District of New York has determined that a Bankruptcy Court has no *in rem* jurisdiction of property of the Debtor located on a boat beyond the borders of New York. *In re Millenium Seacarriers, Inc.*, 275 B.R. 690, 698 (Bankr. S.D.N.Y. 2002). See *Impala Trading Corp. V. Hawthorne Lumber Co.*, 200 F. Supp. 261 (S.D.N.Y. 1961). The local action rule also has been applied or discussed in various situations by the Second Circuit, see *Pasos v. Pan American Airways, Inc.*, 229 F.2d 271 (2d Cir. 1956), the Third, Fourth, and Sixth Circuits, see *Hayes*, 821 F.2d at 287 (citing cases), and the Ninth Circuit, *United States v. Byrne*, 291 F.3d 1056 (9<sup>th</sup> Cir. 2002).

**IV. In The Alternative, Debtors' Abuse Of The Bankruptcy Process Alone Warrants Denial Of Its Motion To Abandon.**

Abandonment contemplated by 11 U.S.C. § 554 is essentially an automatic process if either factor is established as follows: "After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." *In re Manchester Heights Assoc.*, 165 B.R. 42, 44 (Bankr. W.D. Mo. 1994). The legislative history of 11 U.S.C. Section 554 indicates that a Debtor can transfer property through abandonment only to a party that has a possessory interest in the asset. *Id.* "Abandonment cannot be used, 'as a means of effecting a transfer of title.'" *Id.* (citing *In re R-B Co., Inc. Of Bossier*, 59 B.R. 43 (Bankr. W.D. La. 1986)). Debtors' attempt to effect an involuntary transfer of its Vicksburg site is an abuse of the bankruptcy process which in and of itself warrants this Court's denial of Debtors' motion. In addition, immediate identifiable hazards to human health and the environment in the event of abandonment require that Debtors' motion be denied.

**V. Immediate And Identifiable Human Health And Environmental Dangers Require That Debtors' Motion Be Denied.**

**A. Contaminated Runoff Occurs From The VCC Site With Every Rainfall Event, And If The Runoff Collection And Treatment System Is Not Properly Operated And Maintained, A Ten-Mile Stretch Of Hennesseys Bayou Will Be Impacted.**

The most significant immediate identifiable hazard to human health and the environment of Debtors' Vicksburg site is the gross contamination carried by stormwater runoff. Debtor has admitted that VCC is severely contaminated through testimony of its expert witness Gary

Dietrich during a hearing before the Commission as early as 1987. The Commission's Order No.

1253-87 documents the admission as follow:

Dietrich testified that in his opinion the impoundment does serve an important environmental function and the closure of the impoundment would cause that function to be lost. He explained that the entire plant site which operated for many years prior to the adoption of the present environmental regulations is contaminated and the impoundment serves as a collection point for rain water runoff from the plant site. Dietrich further suggested that in the event of a large chemical spill, *the impoundment would serve as a catch basin and without it, such a spill would quickly leak to navigable streams and waters.*

Commission Order No. 1253-87 (August 5, 1987). (Emphasis added).

A discussion of the VCC plant site is necessary to an understanding of the widespread contamination and associated immediate dangers. VCC is composed of a north plant and a south plant. The north plant process area exposes acid, bleach, caustic, and other toxic pollutants to stormwater. When a rainfall event occurs, the stormwater commingles with the pollutants and sediment and carries a turbid hazardous wastewater to a sump located on the north plant. The contaminated runoff is pumped by electrical pumps and piped to treatment ponds located at least 200 yards away in the area of the south plant. The north plant sump capacity is less than 1000 gallons. One overflow of contaminated stormwater could essentially kill Hennesseys Bayou, which flows adjacent to the VCC site and empties into the Mississippi River approximately ten miles downstream. The south plant and surrounding areas (including former process areas) drain to the south sump, which has a capacity of approximately 31,000 gallons. The south plant sump is the lowest elevation of the VCC site. The wastewater draining to the south plant is contaminated with acid, caustic, and sediment pollutants (similar to the north plant) and with arsenic, toxaphene and Dinoscb, which are known toxins. The contents of the south plant sump

are pumped by electrical pumps to the treatment ponds where the wastewater from both plants are mixed, treated, and eventually pumped and piped to a discharge point in the Mississippi River.

After the wastestreams are pumped to the treatment ponds for settling and equalization, the wastewater goes through a pH adjustment. A pH adjustment involves the addition of sulphuric acid or caustic, depending on whether the wastestream is alkaline or acidic. The final phase of treatment consists of force-pumping the wastewater through carbon absorption. Carbon absorption transfers pollutants in the liquid phase to the activated carbon in a solid phase. The result is relatively clean water, with the pollutants trapped in the activated carbon. A properly operated and maintained carbon absorption system is effective in removing organics such as gasoline, benzene, toluene, nitrobenzene, chlorophenols, pesticides (including Dinoseb and toxaphene), herbicides, carbon tetrachloride, trichloroethene, and PCBs.

VCC's process area is approximately 20 acres. Given a one-inch rainfall, the stormwater run-off volume is approximately 543,000 gallons. If not operated properly and continuously during a rainfall event, the north and south wastewater sumps would instantly be overwhelmed and would overflow into Hennesseys Bayou. The overflow would contain untreated toxins that would leave the plant perimeter, immediately endangering human health and the environment. The ponds have a total volume of 6 million gallons when cleared of sediment and sludge and completely empty. But these ponds are never empty and are in constant need of sediment removal. A three-inch rainfall generates over 1.6 million gallons of wastewater. This is not an uncommon rainfall event in the Vicksburg area. Two or more rainfalls of that magnitude would inundate the ponds.

**B. Deposition Of Hazardous Contaminants On Church Recreation Fields Where Children And Adults Recreate Would Be An Imminent, Immediate Hazard To Human Health.**

Breach of VCC's wastewater treatment lagoons would dump contaminated sediments onto Bowmar Baptist Church's recreational fields, which border the banks of Hennesseys Bayou directly across from VCC's property. This situation creates a direct exposure route for deposited contaminants to church members (primarily children) using the recreational fields. Many of the contaminants occur on VCC's site at significantly high levels, as described in more detail herein.

**C. An Old Landfill On VCC's Site That Contains Hazardous Wastes Borders Hennesseys Bayou.**

Documents filed by VCC with MDEQ reference an abandoned landfill located on VCC's site within 200 feet of Hennesseys Bayou. VCC's own report states that at present a portion of this landfill's cover has eroded away on the southwest edge nearest Hennesseys Bayou, which allows the direct discharge of any contaminants in the landfill to the Bayou. It is reported that a variety of waste is disposed in this landfill, including hazardous waste. In addition, VCC has reported to MDEQ that when sediment is removed from the treatment ponds, it is spread over the top of this old landfill. This sediment is contaminated with the constituents in VCC's wastestream. To make matters even worse, the landfill is not lined. Failure to properly monitor and maintain this landfill will result in waste, some hazardous, being dumped into Hennesseys Bayou. Since the landfill is unlined, migration of contamination into groundwater is inevitable. Documents filed with MDEQ by VCC report that the shallow groundwater under its site is hydraulically connected with surface water (including Hennesseys Bayou) and that it is probable that Hennesseys Bayou will be impacted by groundwater contamination from the site.

Continuing groundwater monitoring and maintenance of the landfill are critical to prevent migration of contamination into Hennesseys Bayou.

**D. Other Imminent, Immediate Hazards Involve Products And Wastes On Site.**

MDEQ staff inspected the VCC site on August 21, 2002. Although VCC has taken some action to remove existing product and waste, MDEQ found the following: approximately 30,000 pounds of Nitrogen Tetroxide, a partial rail car of Chlorine, approximately 90,000 gallons of Nitric acid, Potassium Nitrate, gasoline/diesel bulk cars, various lab chemicals from two on-site laboratories, bulk tote-bins of Cobalt Octo-ate, Nitric and Sulfuric acids, and various other materials. Failure to remove remaining products and waste, drain process lines and other equipment will result in leaks and discharges further contaminating the environment. These leaks and discharges will also result in additional opportunities for direct exposure of these contaminants to the public.

**E. Debtors' Failure To Properly Maintain Its Carbon Absorption Beds Will Result In Further Discharge Of Hazardous Contaminants.**

Over one year ago, on August 21, 2001, a joint USEPA/MDEQ inspection was performed at the VCC site. During that inspection, USEPA and MDEQ Staff noted spent (used) carbon spread inside and outside the containment area of the carbon absorption units. Spent carbon from these units can be saturated with hazardous materials removed from VCC's wastestream. Staff of MDEQ and USEPA directed VCC to sample the spent carbon piles to ensure proper characterization and disposal. At the close of the August 2001 inspection, MDEQ and USEPA Staff directed VCC to correct a number of deficiencies including the spent carbon referenced above and other problem areas including piles of used oil drums, spent batteries, used tires, oil

filters and other maintenance wastes. MDEQ and USEPA directed VCC properly to dispose of these wastes to prevent further pollution of stormwater and groundwater.

On August 21, 2002, MDEQ Staff again inspected VCC after being notified of possible abandonment. MDEQ Staff noted that the carbon absorption area was in the same condition as noted in the August 2001 inspection. VCC Staff informed MDEQ that a request for funding was made to corporate offices but that the expenditures had not been approved. The condition of the carbon absorption units remains in this status. No maintenance to the activated carbon beds or the process area has occurred.

Failure to maintain the carbon beds will render the units useless in treating contaminated wastewater and will cause exposure of the environment and the public to the contaminants in the stormwater runoff. VCC advised MDEQ that new activated carbon was needed in at least 2 beds in the unit. VCC Staff advised that the clean-up and maintenance of the carbon absorption unit is not on VCC's current list of priorities, which is further evidence of VCC's flippant attitude toward environmental compliance.

**F. Unrestricted Access To The Most Contaminated Portions Of VCC  
Exacerbates The Imminent Dangers Associated With Abandonment.**

VCC currently has a manned, gated entrance on Rifle Range Road, the north plant entrance. The gate access on Dabney Drive (used in the past) is locked but not manned, making access possible with minimal effort. Unrestricted access is a major problem at the southern end of the south plant area. A rail spur from the Kansas City Southern rail line enters the plant from the south and runs the length of the plant. This entrance is not access-restricted. There are no gates or guards preventing entry from the railway. The south plant is the most contaminated



portion of VCC. It should be noted that railroad lines are traditionally popular areas for recreational walking. The lines are typically maintained, infrequently used, and have good walking surfaces. In fact, there is an effort in Mississippi to convert abandoned railroad lines into walking and cycling trails (the "Rails To Trails" Program). The public could walk unhindered and unnoticed into the south plant area, in particular the south plant sump. As previously noted, the minimal containment in this sump could easily overflow leaving an untreated wastewater stream within feet of the rail line. From the south plant sump, a person could continue into the process area of the south plant, through the former toxaphene and Dinoseb plant areas, to the wastewater treatment area, and into the north plant process area. Exposure to all the hazards of these areas would be imminent to the curious.

**G. VCC Has Filed Documents With MDEQ Identifying At Least Eighteen Contaminants.**

Documents developed and filed by VCC with MDEQ identify at least eighteen contaminants present at VCC, at least fourteen of which are known carcinogens. These contaminants include:

1. **Arsenic.** In its pure form, arsenic is a gray metal-like material. According to USEPA's Integrated Risk Information System, arsenic is a carcinogenic compound. Soil and groundwater associated with VCC's site is grossly contaminated with arsenic. Concentrations of arsenic on VCC's site are as high as 288,000 parts per billion (ppb) in groundwater and 501,000 ppb in soil. The target cleanup levels for arsenic are 50 ppb in water and 426 ppb in soil. Large doses of arsenic (above 60,000 ppb in food or water) can produce death. Ingesting lower levels of arsenic (ranging from about 300 to 30,000 ppb in food or water) can produce irritation of the

human stomach and intestines, with symptoms such as pain, nausea, vomiting, and diarrhea. Swallowing arsenic has been reported to increase the risk of cancer in the liver, bladder, kidneys and lungs. Skin contact with arsenic can cause irritation, redness and swelling. Since children have a tendency to play in dirt and put their hands in their mouths, ingestion of contaminated soil may be a more significant source of exposure for children than for adults.<sup>3</sup>

2. **Dinoseb.** Dinoseb is an organic solid used as a contact herbicide for post-emergence weed control. Concentrations of Dinoseb on VCC's site are as high as 18,821 ppb in groundwater and 8,282,600 ppb in soil. The target cleanup levels for Dinoseb are 7 ppb in water and 78,200 ppb in soil. Short-term health effects reported by USEPA include sweating, headache, and mood changes. USEPA has reported the following long-term health effects: Decreased body and thyroid weight, degeneration of testes, and thickening of intestinal lining.<sup>4</sup> Dinoseb is readily absorbed through the human skin, gastrointestinal tract, and lung surface and is highly toxic to birds and fish. Use of Dinoseb was banned by USEPA in 1986 based on the potential risk of birth defects and other adverse health effects.<sup>5</sup> In the event of overflow of the treatment process, Dinoseb in VCC's wastestream poses an immediate threat to the health of the receiving stream, Hennesseys Bayou.

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<sup>3</sup>Toxicological Profile for Arsenic (Update), August 1998, U. S. Department of Health and Human Resources Public Health Service, Agency for Toxic Substances and Disease Registry.

<sup>4</sup>U.S. Environmental Protection Agency Consumer Factsheet on Dinoseb (last updated May 22, 2002).

<sup>5</sup>Extonet Toxicology Network Pesticide Information Profiles (Revised June 1996).

3. **Toxaphene.** Toxaphene is an insecticide which contains over 670 chemicals. Most uses of toxaphene were banned in the United States in 1982. Concentrations of toxaphene on VCC's site are as high as 110,964 ppb in soil. The target cleanup levels for toxaphene are 581 ppb in soil and 3 ppb in water. Exposure to toxaphene can occur through inhalation, ingestion and/or dermal contact. Poisoning in humans from inhaling and/or ingesting (through eating or drinking) high levels of toxaphene for brief periods has been reported to cause damage to lungs, nervous system, liver and kidneys and can cause death. According to USEPA's Integrated Risk Information System, toxaphene is a carcinogenic compound.<sup>6</sup>

4. **Carbon Tetrachloride.** Carbon tetrachloride is a clear liquid that evaporates very easily. Concentrations of carbon tetrachloride at VCC are as high as 357,500 ppb in groundwater and 6,659 ppb in soil. The target cleanup levels for carbon tetrachloride are 5 ppb in water and 371 ppb in soil. Exposure to carbon tetrachloride can occur by breathing air and/or ingesting water or soil or through contact with contaminated soil. The liver and kidneys are sensitive to carbon tetrachloride. The liver becomes swollen and tender with mild exposure. Severe cases can result in the damage or destruction of liver cells which leads to a decrease of liver function. With respect to the kidneys, exposure to carbon tetrachloride can result in less urine being formed and a buildup of water and waste products in the blood. High exposure to carbon tetrachloride can result in kidney failure. Exposure to high levels of carbon tetrachloride can affect the nervous system causing headaches, dizziness, sleepiness, nausea, and vomiting. In

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<sup>6</sup>Toxicological Profile for Toxaphene, U.S. Department of Health & Human Services (December 1990) pages 1- 4.

severe cases a stupor or coma can result.<sup>7</sup> According to USEPA's Integrated Risk Information System, carbon tetrachloride is a carcinogenic compound.

5. **Chloroform.** Chloroform is a colorless liquid with a pleasant, nonirritating odor and a slightly sweet taste. Chloroform can occur in air, water, and soil. In air, the breakdown products of chloroform include phosgene and hydrogen chloride which are more toxic than chloroform. Chloroform can enter the human body through inhalation, ingestion (food and water), and dermal contact. In humans, chloroform affects the central nervous system (brain), liver, and kidneys. Breathing high levels of chloroform for a short time causes fatigue, dizziness, and headache. Human kidneys and liver may be damaged by breathing air, eating food, or drinking water containing elevated levels of chloroform over a long period. Concentrations of chloroform at VCC are as high as 37,380 ppb in groundwater and 2186 ppb in soil. The target cleanup levels for chloroform are 0.155 ppb in water and 312 ppb in soil. According to USEPA's Integrated Risk Information System, Chloroform is a carcinogenic compound.

The following table summarizes some of the remaining contaminants identified by VCC:

Contaminant	Groundwater	MDEQ Groundwater Target Remediation Goal (TRG)	Soil	MDEQ Soil TRG
Atrazine *	146 ppb	3 ppb	3514 ppb	2880 ppb
Benzene*	23.7 ppb	5 ppb	n/a	n/a
Bromodichloromethane*	296 ppb	0.168 ppb	165 ppb	1240 ppb

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<sup>7</sup>Toxicological Profile for Carbon Tetrachloride, U.S. Department of Health & Human Services (May 1994), pages 1 - 5.

Chloromethane*	126 ppb	1.43 ppb	n/a	n/a
1,1-Dichloroethane*	54.6 ppb	7 ppb	n/a	n/a
1,2-Dichloroethane	1758 ppb	7 ppb	n/a	n/a
1,2-Dichloropropane	42.3 ppb	5 ppb	51.7 ppb	445
Methylene Chloride*	908 ppb	5 ppb	602 ppb	14,300 ppb
Tetrachloroethane*	180 ppb	5 ppb	n/a	n/a
1,1,2-Trichloroethane*	290 ppb	5 ppb	47.7 ppb	1090 ppb
Trichloroethane*	1346 ppb	5 ppb	n/a	n/a
Total Petroleum Hydrocarbons	n/a	n/a	15,431,000 ppb	200,000 ppb
Vinyl Chloride*	46.5 ppb	2 ppb	n/a	n/a

An \* denotes a carcinogenic compound identified in USEPA's Integrated Risk Information System (IRIS).

#### **VI. Case Law, Federal And State Law And Regulations, VCC's Permits, And Even The Bankruptcy Code Support Denial Of Debtors' Motion To Abandon.**

##### **A. Caselaw Supports Denial Of Debtors' Motion To Abandon.**

It is well settled that property may not be abandoned "in contravention of state or local laws designed to protect public health or safety." *Midlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection*, 474 U.S. 494 (1986). Accordingly, "[t]he Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety." *Id.* at 506-507. In *Midlantic*, the Court noted that the debtor in

that case had received over 470,000 gallons of highly toxic and carcinogenic waste oil and that the oil was in unguarded, deteriorating containers. *Id.* at 497. *Midlantic* further noted that the contaminated oil presented risks of explosion, fire, contamination of water supplies, destruction of natural resources, and injury, genetic damage, or death through personal contact." *Id.* at 499 n.3. MDEQ and the Commission submit that the dangers in *Midlantic* compare easily to the imminent and identifiable dangers associated with VCC in the event of abandonment. As noted above, groundwater and soil at VCC is heavily contaminated with at least eighteen contaminants, fourteen of which are carcinogenic. Unrestricted access exists to VCC's south plant, the most heavily contaminated portion. Overflow of VCC's wastewater treatment sumps and ponds will result in the event of abandonment, dumping a "witch's brew" of contaminants into Hennesseys Bayou and on neighboring fields where children and adults recreate.

Following *Midlantic*, the Western District of Pennsylvania proclaimed that "[t]he trustee may not abandon property, even if it is burdensome to the estate and is of inconsequential value and benefit to the estate, if so doing would contravene state statutes or regulations that are reasonably calculated to protect public health and safety from identified hazards." (*In re Guterl Special Steel Corp.*, 198 B.R. 128, 133, (W.D. Penn. 1996). In *Guterl Special Steel*, the Chapter 7 trustee filed a motion to abandon real property that was grossly contaminated with chemical and radioactive contamination. The Court in *Guterl* documented the serious threat to human health and safety posed by the various discarded chemicals present at the site and the fact that human contact with the compounds may result in serious illness and life-threatening conditions. The Court further noted that abandonment of the site would be in violation of state law. For the foregoing reasons, the trustee's motion to abandon was denied. *Id.* at 135.

In *Ohio v. Kovacs*, 469 U.S. 274, 285 (1985), the United States Supreme Court declared that the person in possession of a site must comply with environmental laws and that such person "may not maintain a nuisance, *pollute the waters of the State, or refuse to remove the source of* such conditions." (Emphasis added).

*In the Matter of Environmental Waste Control, Inc.*, 125 B.R. 546, (Bankr. N.D. Ind. 1991), the court held that a Chapter 11 debtor-in-possession would be required to comply with environmental cleanup plans ordered by state and federal agencies despite the claim of insufficient funds to complete the cleanup. The site had soil and groundwater contaminated with benzene, carbon tetrachloride, 1,2 dichloroethane, and trichloroethane, which are four of the eighteen contaminants found at VCC's site. The court held that the Debtor "must comply with environmental law and pursue cleanup and corrective action at the landfill, regardless of its financial insolvency." *Id.* at 552.

As noted above, VCC has failed to comply with state laws and regulations and its NPDES permit applicable to transfer and closure of VCC. These laws and regulations are designed to protect public health and safety and specifically include the approval of closure plans by the State's environmental regulators. See note 1, *supra*. The Debtor should not be allowed to ignore its regulatory obligations to the State of Mississippi, and the Commission/MDEQ respectfully suggest that this Court lacks the authority to negate those obligations and, simultaneously, urge the Court to exercise its discretion in avoiding such a conflict with state environmental regulation.

**B. Federal And State Laws And Regulations And VCC's Permits Support Denial Of Debtors' Motion.**

28 U.S.C. Section 959 requires that:

A Trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

VCC has not complied with Mississippi law and regulations applicable to the operation and closure of its plant. Miss. Code Ann. Section 49-17-29 provides that the modification of any environmental permit, such as a transfer to another owner or a change in operation due to closure, must be approved by the Mississippi Environmental Quality Permit Board. The corresponding regulation related to transfer of VCC's NPDES Permit provides as follows:

A permit transfer shall be approved if the applicant for transfer approval can demonstrate to the Permit Board it has the financial resources, operational expertise and environmental compliance history over the last five years to insure compliance with the terms and conditions of the permit to be transferred.

WPC-1, Chapter One, § V.C.2.c.

The regulation relating to transfer of VCC's Title V permit is almost identical. VCC has filed no applications for transfer of either its NPDES or Title V permits. In addition, VCC has not complied with its permits and Commission regulations regarding closure of its facility. With regard to closure, VCC's NPDES Permit, Part. III.B., provides as follows:

Should the permittee decide to permanently close and abandon the premises upon which it operates, it shall provide a Closure Plan to the Permit Board no later than 90 days prior to doing so. This Closure Plan shall address how and when all manufactured products, byproducts, raw materials, stored chemicals, and solid and liquid waste and residues will be removed from the premises or permanently disposed of on site such that no potential environmental hazard to the waters of



[G]roundwater monitoring has been required of this facility pursuant not only to the regulations, but also on the basis of the Clean Water Act. [Cedar Chemical] continues to have a responsibility to sample and analyze groundwater monitoring wells that have been installed on the perimeter of the surface impoundment on a regular basis and to report the analytical results of such samples to the [MDEQ] on a quarterly basis. In the event the [MDEQ] should determine on the basis of such analytical results the corrective action is *necessary to protect human health or the environment*, the [MDEQ] still maintains the power and indeed the duty to require the Respondent to implement such corrective action as shall be reasonably required. Cedar Chemical maintains a closure trust fund for the Vicksburg Plant, which the Respondent is willing to maintain intact, in order to provide financial assurance that the surface impoundment will eventually be closed when it is no longer needed for waste management, including collection of contaminated storm water runoff. Moreover, the company maintains the responsibility of maintaining the integrity of the containment dikes around the surface impoundment. This obligation exists under both the Clean Water Act and RCRA. Further the company must continue to comply with all provisions of its NPDES permit as it pertains to the treatment and discharge of a fluid from the surface impoundment, including not only non-hazardous wastewater discharge to the surface impoundment from inorganic production operations at the plant, but also surface and storm water runoff received from the surface impoundment.

(Emphasis added).

The purpose of these laws, regulations, permits, and order is to protect the public health or safety from imminent and identifiable harm. VCC has filed neither an application for permit transfer nor a closure plan with MDEQ and, therefore, is in violation of the aforementioned laws, regulations and permits. Hence, its motion to abandon should be denied pursuant to the *Midlantic* factors.

**C. The Bankruptcy Code Supports Denial Of VCC's Motion To Abandon.**

11 U.S.C. Section 362 (b)(4) excepts "the commencement or continuation of an action or proceeding by a governmental unit to enforce such government unit's police or regulatory power." This Bankruptcy Code provision recognizes the importance of allowing a governmental